In the Supreme Court of the United States

OCTOBER TERM 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU,
Appellant,

vs.

JOHN R. MALONEY, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, substituted for Wallace K. Downey,
Appellee.

Appellant's Reply Brief

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Appellant's Reply Brief

The purpose of this reply brief is to draw together appellee's argument to see just what it is and where it joins issue. We think that in this way the lack of merit in his case will reveal itself.*

Appellant's opening brief will be referred to by the symbol "O.B. ....," and appellee's brief by the symbol "A.B. ....."

*We shall pass by matters in appellee's brief that could be the subject of comment, e.g., the fact that it goes outside of the record in assertions of fact, even referring to events said to have occurred after the close of the hearing in this case (see footnotes 4, 12, and 25 at A.B. 6, 16, and 38).

Appellee states the test of constitutionality under the due process clause to be this: If a statute is the exercise of the police power,† has a proper purpose and object in the interest of the public welfare, and is not unreasonable, arbitrary or capricious, and if the means selected have a real and substantial relation to the object sought to be attacked, it is constitutional (A.B. 17).

But the law has devised the technique of pricking out a line from case to case in order that terms such as "proper," "unreasonable," "arbitrary," "capricious," "real and substantial relation" may gain intelligibility in specific situations.

In our opening brief we showed that these terms, when applied to this kind of case, that of statutory compulsion to serve, associate and contract, necessarily result in the conclusion of unconstitutionality.

It is therefore necessary to see how appellee advances from his generalities to their application. This we now proceed to do.

1. Public Policy May Not Be Achieved at Private Cost.

The essential basis of appellee's case may be summarized in his own words:

> "The social interest of the people of California in the protection of highway accident victims and their dependents, and the economic burden on the public purse when adequate compensation is not available to the victim or his dependents are obvious." (A.B. 38, end of footnote 23.)

And more bluntly (A.B. 40):

> "the statute and plan [are] reasonable and appropriate to the obvious and legitimate social ends to which it tends, indemnity for innocent victims of highway accidents and insurance protection to the automobile drivers and owners from drastic license penalties and loss."

†The term "police power" is but another name for the power to govern, the whole power of state government other than the power to tax and the power of eminent domain. It must be exercised within the Fourteenth Amendment.

But this justification of the statute is, we submit, its own condemnation.

In our opening brief we submitted (O.B. 24) that

> "the statute is seen to be, in essence, the same as one which prescribes that after a judgment should be rendered for damages against an uninsured driver, that judgment should be paid pro-rata by careful drivers."*

The foregoing quotations from appellee's brief confess the truth of this observation. They are a frank statement that because it is deemed to be public policy that innocent victims of highway accidents be compensated, a group of careful drivers who desire only to help each other must pay damage judgments, arising not from their own fault but from the fault of others with whom they have had no conceivable nexus or relationship.

We dealt with this kind of argument in our opening brief (at pages 66-70). We repeat, in summary, that public policy must be served at public cost and not at private cost, that the state may not compel natural persons to devote their property to public functions or to convert their free associations into organs of the State.

As indicated by Mr. Justice Holmes for the Court in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416, a man's misfortunes or necessities will not justify shifting the damages to his neighbor's shoulders,

2. Appellant Cannot Constitutionally Be Compelled to Insure Non-Members, Because That Is Beyond the Scope of Its Voluntary Dedication.

Immediately following the passage quoted above, that public policy favors indemnity for innocent accident victims, appellee rounds out his argument by asserting that "Insurance is a means

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*Appellee calls attention to Sections 11580 and 11581 of the California Insurance Code, which permit successful plaintiffs in personal injury suits to collect directly from the defendant's insurer (A.B. 14). These sections underscore our statement.

of providing the indemnity and protection," and that "the insurance companies are in the business of providing it" (A.B. 40). Ergo, they may be compelled to provide it.

At this point a major flaw in the argument is revealed: *Appellant is not in the business of providing indemnity and protection to the public.* It operates solely to provide such protection and indemnity to the members of the State Automobile Association. In our opening brief we said that if the concept of "public utility" were to be discarded as the criterion of compulsory service, and if the same power of compulsion were applied to insurance, "it might conceivably be said of insurers engaged in business for profit, that they have already offered to do business with the public generally, that they are 'common insurers,' and therefore that the lay can require them to serve within the full ambit of that offer." (O.B. 46, 47). But, we pointed out, that argument can have no relation to appellant, because its dedication since its inception has been to serve only members of the Association.*

When he confronts the question directly, appellee admits that one cannot be made a public utility by legislative fiat, that one's status as a public calling is created by the fact of his own voluntary dedication, and that even a public utility cannot be compelled to serve beyond the limits of its dedication (A.B. 72, particularly 74). Necessarily, then, the fact that appellant's voluntary dedica-

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*Appellee quibbles that appellant has not confined itself to members but to members and firms and corporations of which members are partners or officers (A.B. 7). The word "members" was used in our brief—and obviously so—as including such firms and corporations (cf. O.B. 7, 8). The opinion of the court below uses the word in the same sense (R. 175, quoted at O.B. 10).

Appellee also quibbles that it is not appellant's power of attorney that has always limited it to insuring members of the Association but its rules and regulations (A.B. 76). The power of attorney incorporates the rules and regulations by reference (see O.B. 7, 8).

Appellee even argues that appellant can change its rules and regulations. This says no more than that appellant can expand its voluntary dedication if it wishes. The same could be said of any private carrier. But since appellant has not done so, it cannot be compelled to do so,

tion has been limited to the members of the Association should be a firm obstacle to application of the statute to it so far as it compels contracts with non-members.

Appellee therefore seeks to escape the consequence in three ways:

First, he parts company with the court below. The court sought to substitute legal fiction for fact in deciding what appellant's dedication has been (see O.B. 48-51). Since dedication is a pure question of fact, the court erred in its law.* Appellee concedes the law and makes no attempt to support the court's reasoning on the subject. Instead, he assails the unassailable by denying the fact; he asserts that "there is no evidence in the record or anywhere else, that appellant * * * has dedicated its services to any particular group." (A.B. 75). This but asserts that black is white. We are content to call attention to the findings (quoted, O.B. 7) and to the statements and opinion of the court below that appellant has always "adhered, strictly, to its policy of insuring only members of the California State Automobile Association" (R. 175, quoted O.B. 10), and that "appellant has heretofore insured only a select group" (R. 193, quoted O.B. 49).

Second, appellee denies that the statute runs afoul of the rule that one cannot be compelled to serve beyond his dedication because it does not require appellant to serve any man who walks in off the street and only requires it to insure such people as may be assigned to it (A.B. 57-62). This is a pointless distinction.

*The fundamental law is stated again in a decision of the California Supreme Court rendered February 9, 1951, *Samuelson v. Public Utilities Commission*, 36 A.C. 686. The Court annulled an order of the Commission commanding a carrier to cease and desist from highway carriage. The Commission erroneously held him to be a common carrier because his activities were not "substantially restricted." The Court held that the correct test "requires an unequivocal intention to dedicate property to public use. * * * the question of the carrier's intention is a primary factor in determining the character of carriage * * *." (696). "The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently * * *" (p. 693). The court cites *Frost v. Railroad Commission*, 271 U.S. 583.

The essential fact is that the statute compels appellant to serve beyond its voluntary dedication, and it may not constitutionally do so whether it attempts to throw appellant open to the wide world or to a small segment. Cf. *Missouri Pacific Railway v. Nebraska,* 164 U.S. 403.*

Third, appellee makes an argument wholly at war with his concession that one cannot be compelled to serve beyond his voluntary dedication. He states that "failure to voluntarily dedicate the business to the public service was no barrier to proper regulation" (A.B. 75). This, of course, is true, but appellee would have the court conclude that failure to make such dedication is no bar to compulsion to serve. This is a complete non-sequitur.† No case is cited that supports it. On the contrary the cases recognize a clear line of demarcation between regulation, however broad, and compulsion to serve (O.B. 34, 37-40). Appellee cites *Fordham Bus Corporation v. United States,* 41 F. Supp. 712, but we ourselves cited that case as stating the difference (O.B. 40). In simple fact, appellee slips quite away from the question whether one can be compelled to serve against his will to a discussion of the power to regulate, which includes the power to prohibit or curtail the exercise of rights (A.B. 49-52, 72).

Appellee cites cases like *Brass v. Stoeser,* 153 U.S. 391 (at A.B. 48, 51). The case pertained to a warehouse, a kind of business

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*Appellee's argument and discussion (A.B. 55, et seq.) draws attention to another constitutional vice in the Plan (see O.B. 71). Assignments of risks are made by a private citizen, the Plan manager, who in turn is appointed by a governing committee of five, also private citizens selected by the insurers. The committee may capriciously decide whether a risk is or is not such that "his operation of an automobile would endanger public safety"; its "satisfaction" is the test (see A.B. 15, fn. 11). Thus private individuals judge whether appellant must assume risks it does not wish to assume. See *Eubank v. Richmond,* 226 U.S. 137; *Washington ex rel. Seattle Trust Co. v. Roberge,* 278 U.S. 116.

†In the recent case of *Samuelson v. Public Utilities Commission,* 36 A.C. 686, 694 (Feb. 9, 1951) the California Supreme Court, citing *Stephenson v. Binford,* 287 U.S. 251, refers to the difference between the common carrier status and subjection to regulation.

historically subject to the duty of public service, like the carrier and inn keeper.* It involved the validity of rate regulation and not any question of compelling service to those whom the warehousemen did not wish to serve. Brass was willing to store the tendered grain, but not at the rates prescribed by statute (143 U.S. at 391, bottom). The Court took pains to point out (p. 404) that the question of compelling a private warehouse to store for others did not arise because Brass had in the past voluntarily stored for the public. The case is uniformly cited as a rate regulation case.†

Appellee derides the expression "freedom of contract" (A.B. 52, 69). But we have not used that phrase. In the past it has been abused to prevent regulation of contracts by the state, i.e., the regulation of the terms that must go into a contract if one chooses to enter into it, or the prohibition of some kinds of contracts entirely. The present case is concerned, not with freedom of contract, but with freedom from being coerced into entering into the contract at all.‡

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*Appellee's history of the subject (A.B. 49) is hardly correct. The inn, the warehouse and the carrier are historical remnants of the medieval "common callings." The duty of public service was later applied to the water, gas and power distributor who operated under public franchise, and a theory of "public utility" was generalized. The common thread of all is the voluntary dedication to serve the public indifferently. See *Wolff Company v. Industrial Court*, 262 U.S. 522 at 535.

†E.g., in *U. S. v. Rock Royal Cooperative, Inc.*, 307 U.S. 533, 570, fn. 46; *Nebbia v. New York*, 291 U.S. 502, 534.

‡Appellee denies that *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, recognizes the difference between the power to regulate and the power to compel service (A.B. 71). He contends that the case merely held that a state could regulate rates even though it had not seen fit to compel service. This assumes that someone had been absurd enough to argue to the Court that, while the state possessed both the less extreme power to regulate rates and the more extreme power to compel service, it could not exercise the less extreme until it had first exercised the more extreme. The basic assumption of the *German Alliance* case is the lack of power to compel service. The fact is shown by a straightforward reading of the passage quoted at A.B. 50. This Court itself has so regarded the case (*Wolff Company v. Industrial Court*, 262 U.S. 522, 537, 538), and it is often cited to that effect, e.g., 11 *Am. Jur.* 1059, Note 7.

3. The Statute Cannot Be Sustained on the Theory That the State Can Demand Compliance as the Price of Permitting Appellant to Continue in Existence.

The court below held (R. 193):

> "No company can be compelled to assume a risk. But if it refuses to accept an assigned risk, its right to do business in this state may be terminated."

The court thereby admitted that appellant could not directly be compelled to assume unwanted risks. But it asserted that the state could impose the same compulsion as a condition of continued existence. We showed that this reasoning conflicts with the doctrine of unconstitutional conditions (O.B. 55-60).

It is a striking fact that *appellee does not openly attempt to defend that reasoning.* When confronted directly with our discussion of this very matter, he openly concedes that if the statute is not constitutional as a direct compulsion, he, "of course, cannot claim that the fact that compliance is made a condition of doing an automobile liability insurance business in the State will in itself cure the unconstitutionality" (A.B. 68).*

At this point in his brief appellee rests on the assertion that the statute is valid as a direct compulsion.

But analysis shows that much of appellee's brief proceeds on assumptions directly contrary to the concession just quoted. For example, he sums up a line of argument with these words, "the appellant has the choice of writing automobile liability insurance in California on condition that it accept its equitable proportion of risks * * * or of refraining from doing that business in California" (A.B. 57). This conclusion is rested on the premise that the state can take over the whole insurance business for itself if it wishes (A.B. 45). Perhaps it can. But it does not follow that

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*Appellee curiously states that a constitutional statute does not "become unconstitutional because made a condition to doing business in the State" (A.B. 68). Quite true, but an unconstitutional one does not become constitutional because made such a condition.

it can impose on a private person any kind of compulsion as the price of not exercising its power to pre-empt the business.

Appellee invokes cases like *Noble State Bank v. Haskell,* 219 U.S. 104, and *Mountain Timber Co. v. Washington,* 243 U.S. 219 (A.B. 46). In the *Noble Bank* case the state did no more than create a state insurance fund, require banks to insure deposits, and give that fund a monopoly of the insurance. The *Mountain Timber* case, like the *Noble Bank* case, merely made a certain kind of insurance coverage mandatory and created a monopolistic state fund for the purpose.* Similarly, we concede, California can require all motorists to carry insurance, and we have ourselves suggested that the creation of a state fund would be a constitutional way of serving the alleged public policy discussed at pages 2 and 3, supra.

It may well be that the State of California can declare it to be public policy that private insurers go out of business entirely or that the reciprocal method of self insurance is inimical to the public interest and must cease. But in fact it has made no such declaration, and it is inconceivable that the people of California would ever countenance legislation that pretended to do so. The state is here merely trying to use deprivation of the right to do business as a club to compel appellant to do what it cannot compel it to do directly.

The doctrine of unconstitutional conditions will not permit it to do so. *And appellee, when brought face to face with the question, has conceded the fact* (see p. 8, supra).

Similarly, appellee argues that the state might compel every

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*Appellee says of the statute involved in that case that it was more than a restriction on an insurance company's right to contract, "it was in one leading field of casualty insurance an abolition of the right" (A.B. 46). This is an erroneous characterization. The statute abolished no right of any insurance company theretofore existing. It related to workmen's compensation insurance, which was a creature of the statute. The statute which created the business confined it to the state fund (cf. O.B. 65).

driver to contribute to a state fund to reimburse losses of victims of automobile accidents. But that power is no basis for supporting the kind of legislation here involved. The exercise of that power would be no more than a kind of taxation for a public purpose. And there is a constitutional distinction between achieving public ends by taxation and doing it in other ways. Mr. Justice Brandeis, speaking for the Court, pointed that out in *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405 at 429.

The same tacit disregard of the doctrine of unconstitutional conditions, which appellee will not openly dispute, underlies other of his arguments. For example, he argues that many laws confront one with a choice of complying or going out of business (A.B. 55-57). The fallacy of comparing such situations with the present case is obvious. If the state can directly require that an act be done in a given way if it is to be done, the alternative to doing it in the prescribed way is not to do it at all. Thus the state may prescribe the form of fire insurance contracts, and one either writes insurance on this form or not at all.* By contrast, where the purpose is not to regulate the manner of doing business but to make an unconstitutional compulsion, the choice is not between doing an act in the manner required by law and not doing it. It is a choice between succumbing to an unconstitutional imposition or succumbing to a penalty for refusal (cf. O.B. 60).

Still again, appellee makes assertions such as the following (A.B. 78): "Precious as is the right of freedom of association, it, also, like freedom of contract, may properly be limited by the State when used for purposes contrary to the public policy of the State." But California has seen no evil in appellant's mode of operation. Appellant's operations are not contrary, nor used for purposes contrary, to the public policy of the state (cf. O.B. 60).

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*Cf. O.B. 34 where we say that, under the power to regulate, the state "may prescribe the terms that will enter into a contract if one chooses to make the contract * * *. But none of this comprehends power to compel one to contract."

As we have said (O.B. 34), "a cooperative hurts no one by serving only its members." No one claims that any injury, public or private, flows from what appellant does. The State simply wants it to do something else as well.

APPELLANT'S RIGHT TO DO BUSINESS IS NOT A PRIVILEGE DERIVED FROM THE STATE.

Appellee repeatedly asserts that appellant's right to do business is a privilege derived from the state (e.g., A.B. 27). Unless he wishes to deny the doctrine of unconstitutional conditions—which in fact he admits—it is difficult to understand why he makes the assertion. Even then it would be immaterial. This matter of privilege came into the discussion in connection with our statement that "a lawful power of a state—even the power to grant or deny a privilege—cannot be exercised as an instrument to accomplish an unconstitutional result'" (O.B. 55), and that, since this doctrine limits a state's power to deny a privilege, *a fortiori* it applies here where appellant's right to do business is not a privilege derived from the state (O.B. 59, 60).

Moreover, appellee's assertion, we submit, is patently unsound (see discussion, O.B. 59, 60). The notion that the liberty of natural persons to do business or to contract with each other is a privilege derived from the state is one that ought to be abhorrent to every American, for it is of the very essence of statism. Under our system the state is made for man and derives its powers from him, not the reverse. A contrary view should not be permitted to be the starting point of any reasoning whatever.

What is the privilege which according to appellee the State of California has granted to appellant and its subscribers? As we have pointed out (O.B. 59), appellant is merely an aggregate of private contracts among persons, called subscribers, who desire to provide themselves with cooperative insurance by agreeing *inter se* to share losses. Noting that the subscribers are liable only to the extent of their annual deposit, unless a reserve fund falls below a certain margin, and then only for a like additional sum

(A.B. 27, 66, 78), appellee would assimilate this to the grant of a corporate charter with its incident of limited liability. Appellee even asserts that "this form of organization exists solely through legislative permission" (A.B. 3).

This reasoning is false. It takes no grant of a privilege from the state for A, B and C to contract with one another to share losses. That is all that a reciprocal is, and reciprocals existed before any legislation on the subject (O.B. 59).* Similarly, it takes no grant of privilege from the state to permit A, B and C, in so contracting with each other, to agree that each one's contribution shall not exceed an agreed amount.

We do not suggest that because the liberty to engage in a given activity is not based on a grant of privilege, it cannot be regulated. The state may doubtless provide that if reciprocal contracts are made, the limit of each subscriber's commitment shall be something larger than he otherwise would wish, as a guard of solvency.

Doubtless, too, as appellee says (A.B. 66), the state may make and change statutory provisions governing reciprocals—perhaps even prohibit them entirely. If it does any of these things, it is exercising a power to regulate. But in no event is it granting a privilege. All such changes would have to be justified on their own. But the power to make them cannot be used as a club by which to coerce acquiescence in an unconstitutional imposition.†

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*Best's Insurance Reports, Casualty, Surety and Miscellaneous (37th annual edition, 1950), p. 741, notes that "the earliest reciprocal insurance exchange has been in active operation since 1881 * * *." It also states that

> "In many instances, reciprocal or interinsurance associations or exchanges, which are of comparatively recent origin, have been the result of voluntary agreements, entered into without the benefit of statutory authorization or subject to special legislative regulation."

†Appellee asserts that in substance a reciprocal does not differ from a mutual insurance corporation (A.B. 3, fn. 1 and elsewhere). On the contrary, it differs in many material respects. A reciprocal is not a corporation. As said in 29 Am. Jur. 55, 56:

> "By the term 'reciprocal insurance,' or 'interinsurance' or 'interindemnity,' as it is sometimes called, is meant that system whereby in-

4. No Decided Case Sustains the Legislation Here Assailed.

Appellee concedes that this Court has never sustained the validity of any statute compelling an insurer to insure persons or risks against its will (A.B. 20).

But it states that "with one exception, whenever these statutes have been passed on by State Courts they have been sustained" (A.B. 17). This is disingenuous. In only one state, Arizona, has the constitutionality of a statute compelling an insurer to grant insurance been in issue in a controverted case, and the Arizona Court held the statute to be unconstitutional (see O.B. 32).

Appellee notes that two states in addition to California—New York and Illinois—have a kind of compulsory assigned risk law for automobile insurance (A.B. 21).* They were adopted only a little while before the California Act, which appellant at once assailed, and neither has come into the courts.

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dividuals, partnerships, or corporations, engaged in a similar line of business, undertake to indemnify each other against a certain kind or kinds of losses by means of a mutual exchange of insurance contracts, usually through the medium of a common attorney in fact appointed for that purpose by each of the underwriters, under agreements whereby, as among themselves, each member separately becomes both an insured and an insurer with several liability only. Thus, while the reciprocal system of insurance resembles both Lloyds and mutual insurance, it differs materially from both. * * *."

As said in *Industrial Indemnity Exchange v. State Board of Equalization*, 26 Cal.2d 772, 777, 161 P.2d 222, quoting from an earlier decision:

> "From what has been said, it is apparent that a reciprocal 'organization' differs in many respects from the ordinary stock or mutual insurance company."

The California Insurance Code recognizes that reciprocals are on a different footing from other forms of insurance. The code contains a separate chapter on reciprocals and provides (Section 1281) that none of the statutory provisions relating to insurance shall apply to reciprocals except as specifically designated.

*Massachusetts also has a form of compulsory acceptance of automobile insurance risks.

Appellee also notes that the workmen's compensation statutes of four states purport to compel acceptance of risks. But workmen's compensation presents a different question, for reasons noted at p. 9, supra, and in our opening brief at p. 65.

Best's Insurance Reports, Casualty, Surety and Miscellaneous (37th annual ed., 1950), p. 741, states that "Some [reciprocal] exchanges restrict their writings to select risks in certain industries, territories or coverages." It follows that many, if not most reciprocals, are open to the general public. This may explain why no one in other states has raised the precise issue that appellant here has raised.*

Appellee discusses at length (A.B. 22-27) the Massachusetts' advisory opinion, *In re Opinion of the Justices,* 251 Mass. 569, 147 N.E. 681. We would not add to the discussion of our opening brief on that subject (O.B. 61-65), except for appellee's effort to attach weight to it by saying that it has been frequently cited in Massachusetts and that the provisions of the Massachusetts act have been litigated. But the opinion has been cited in connection with questions not related to the issue of constitutionality here involved. The statute covered several matters, and the cases cited refer to provisions not here germane.

Appellee cites (A.B. 25) only one other Massachusetts case which he directly asserts involved the constitutionality of the provision requiring insurers to insure risks, *Factory Mutual Liability Ins. Co. v. Justices,* 300 Mass. 513, 16 N.E.2d 38. We submit that appellee misreads the case. The issue of constitutionality was not there raised, controverted, argued or discussed in the opinion.

Appellee also discusses at length the Texas workmen's compensation cases referred to in the opinion of the court below (A.B. 27-31). As we said in our opening brief (p. 65), these Texas cases start, proceed and end with dicta. An annotation in 107 A.L.R. 1422 relates the curious history of these cases, whereby it has come to be said that in Texas insurers must issue workmen's

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*Appellee asserts that there are other reciprocals in California (A.B. 4, 5, fn. 3 and 4). Best's Insurance Reports, supra, shows only two others besides appellant who write automobile liability insurance, and neither confines itself to a limited group.

compensation insurance, although the issue has never been litigated, argued or reasoned out.

5. The Statute Deprives Appellant and Its Members of Liberty Without Due Process, and It Also Deprives Them of Their Property.

In its statement of the question presented, appellee confines the issue to one of taking property without due process (A.B. 2). The issue is broader and includes the deprivation of liberty.

Having sought to confine the question so, appellee later argues that no question of taking property for public use is presented (A.B. 62-65). And this assertion is based on the claim that there is no showing that appellant will sustain a financial loss on assigned risks.

The answer is twofold:

1. One's liberties are broader than money. To compel one unwillingly to do business or to contract with another, to assume his liabilities or to render service to him, is itself a deprivation of liberty, regardless of financial loss. The adequacy of the receipts does not enter into the question, because the obligation imposed goes beyond the reasonable exercise of the state's power. *Northern Pacific Railway v. North Dakota*, 236 U.S. 593, 595, 596; *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403, 417.

This Court has often said that to make a private carrier into a public carrier by legislative fiat is beyond the power of state because "it would be taking property for public use without just compensation, in violation of the Due Process Clause of the Fourteenth Amendment," *Michigan Commission v. Duke*, 266 U.S. 570, and other cases cited in our opening brief at page 37. This is stated repeatedly in the authorities, see *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 699, 137 Pac. 1119, 1142; *Atchison, T. & S. F. Ry. Co. v. Railroad Commission*, 173 Cal. 577, 160 Pac. 828, 2 A.L.R. 975, writ of error dismissed, 245 U.S. 638; *Oklahoma Natural Gas Co. v. Corporation Commission*, 88

Okla. 51, 211 Pac. 401, 31 A.L.R. 330; 109 A.L.R. 556, and is summed up in 43 *Am. Jur.* 588 thus:

> "To require a public utility to devote its property to a service which it has never professed to render or to the service of a territory which it has never undertaken to serve is tantamount to taking that property for public use without just compensation."

Cases involving rate regulation or price fixing involve a wholly different consideration (cf. A.B. 65). There one either is free not to sell at all, if he does not wish to do so at the price fixed, or else he has already voluntarily dedicated himself to serve the public. In either event the right to serve against one's will is not involved. The power to regulate the rates being granted, nothing but money is involved in such cases, and monetary loss is the test.

2. In fact, the assigned risks are bad. Much sophistry and pious speculation is answered by one observation: The risks would not come to the Assigned Risk Plan if they were good (see O.B. 14).*

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*And see passage quoted at O.B. 67, footnote, "Do you imagine that if all these risks were sound from an underwriting standpoint there would be any necessity for their assignment?"

Appellee asserts that the plan "winnows out the really uninsurable" (A.B. 15, 40). The matters related merely indicate that the plan could be worse than it is, and may be, whenever the Insurance Commissioner sees fit to make it so.

Appellee's assertion is somewhat sardonic in light of the fact that the following are eligible under the plan: Persons convicted of any number of crimes, however recent, if not related to automobile driving; persons convicted more than three years earlier of any number of crimes of any kind; persons convicted at any time of two convictions for driving while drunk or for driving recklessly or at excessive speed resulting in collisions in which third persons were killed or injured or any amount of property damaged; persons convicted once of driving while drunk and once either of manslaughter while driving an automobile or of theft of an automobile, or any felony of any kind in the commission of which an automobile was used (R. 14, 15; Plan, Sections 2431, 2431.1, 2431.2).

In the proceedings below appellant offered certain statistics comparing its own loss ratio with the loss experience under the former voluntary

There is still another fundamental vice in appellee's conception of this matter of financial injury. He apparently conceives that unless the total of all deposits received from assigned risks is less than the total of losses paid out on them, plus costs, appellant and its subscribers have not been financially injured. He overlooks several facts concerning the appellant and the consequences of those facts:

1. Appellant is simply the agency whereby its subscribers insure one another by contract and contribution to a common fund. The surplus left in the fund after payment of losses and expenses is periodically returnable to the subscribers in proportion to their deposits (O.B. 7). 2. Subscribers foisted on appellant by the law will participate in such returns. 3. If the loss ratio on assigned risks is greater to any extent than the loss ratio on voluntarily accepted risks, the proportionate amount returnable to the subscribers is reduced; the savings to them are diluted. Necessarily, the loss ratio on assigned risks is something greater than on others. Otherwise, they would not come through the Assigned Risk Plan (O.B. 14).

The upshot is that the net cost of insurance of the non-assigned subscribers is increased, the careful drivers do not benefit to the full from their own carefulness, and the purpose of appellant's

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plan, but this evidence was rejected. Appellee justifies the rejection by arguing that the risks assigned through the voluntary plan were the most obnoxious kind of risk, the "worst class" of those eligible under the present plan (A.B. 14), while the compulsory plan includes a "better class of drivers." That they are better as financial risks is pure assumption. It is also irrelevant. Because the risks under the voluntary plan were bad, the premium charge averaged 140% of normal. Still the loss ratio was the ruinous figure of 80%. If some of the assigned risks under the compulsory plan are not so bad, then the premium chargeable will decline toward the 100% bracket. The ruinous loss ratio of 80% was a fraction of which the numerator was the losses and the denominator the 140%. If under the new plan the average risk is not as bad as under the voluntary plan, so that the numerator decreases, the denominator (the premiums) also decreases toward 100%. Losses under the compulsory plan could be as low as 65% of what they were under the voluntary plan, and still the loss ratio would be as bad or worse than the 80% figure, as compared to appellant's 50% loss ratio experience.

creation to supply a cooperative insurance at lowest cost is defeated. No matter by what amount the cost is increased, it is an out-of-pocket deprivation.

Furthermore, appellant's reserve in proportion to the total insurance written is reduced, and thereby its subscribers are brought closer to the possibility of assessments (Cal. Ins. Code, Sec. 1390-1402; see Appendix C of appellee's brief).

Whether some of the assessments are paid then depends on the character and responsibility of persons not selected by appellant but foisted on it. Yet, by the very nature of the Assigned Risk Plan, and in the language of the California Supreme Court (quoted O.B. 24), at least a substantial number of them are obviously careless and financially irresponsible.

The False Issue of Anti-Discrimination.

Appellee states that the plan assigns to insurers not merely those who must have insurance to get a driver's license, i.e., law violators or drunks, but also "members of minority groups, particularly the colored drivers, persons with minor physical disabilities, the young and the old drivers" (A.B. 11, 14). The fact that appellee makes this statement not once but twice suggests a renewal of an attempt made in argument in the court below, but not in the evidence, to inject into this case the issue of racial discrimination.

No evidence of discrimination by any insurer because of color appears in the record nor any evidence that appellant has refused to insure members of the Association, or that the Association refuses membership, on racial grounds.

The issue has no place in the case. The Assigned Risk Law has nothing to do with racial discrimination. It nowhere mentions the subject, the legislative history contains no reference to it, and the provisions of the act are not aimed at it.

Assuming that under the Assigned Risk Plan members of some racial groups would be given access to insurance otherwise not

open, this consequence is incidental, and the terms and general operation of the statute are far more comprehensive. A statute which would be valid if limited to a proper purpose cannot be sustained on that ground if it has other effects not embraced within that justification. *Fairmont Creamery Co. v. Minnesota.* 274 U.S. 1.

The constitutionality of statutes prohibiting discrimination because of race, color or religion rests on a different basis and turns on a different set of considerations from any involved in the present case. Such a statute can not sensibly be said to conflict with a constitutional provision having its birth in the same purpose. See O.B. 41, footnote.

CONCLUSION

We submit that the judgment of the court below should be reversed with directions to enter judgment annulling the order and decision of the Insurance Commissioner.

San Francisco, California,
March 3, 1951.

Respectfully submitted,

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